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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. [redacted]

INCRES STEAMSHIP COMPANY, LTD.,
Petitioner,

against

INTERNATIONAL MARITIME WORKERS UNION and SHANNON J. WALL and EDWARD POGOR, JOHN DOE and RICHARD ROE,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK.

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OCTOBER TERM, 1961

No. 469.

INCRES STEAMSHIP COMPANY, LTD.,
Petitioner,

against

INTERNATIONAL MARITIME WORKERS UNION and SHANNON J. WALL and EDWARD POGOR, JOHN DOE and RICHARD ROE,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK.

Opinions Below.

The opinions in the courts below are correctly cited and reprinted in the petition.

Statute Involved.

The statute involved is the Labor-Management Relations Act of 1947, as amended, 29 U. S. C. A. 141, *et seq.*, reprinted in part in Appendix G of Incres' petition.

Summary of Arguments Against the Granting of the Petition.

1. This Court, on April 21, 1961, denied certiorari in *Navios Corporation* v. *National Maritime Union*, 402 Pa. 325 (1960), 81 S. Ct. 1047, a case involving the identical

question posed by the instant petition. Application for reargument was denied on May 29, 1961, 81 S. Ct. 1658.

2. The National Labor Relations Board has asserted jurisdiction over foreign-flag vessels engaged in American commerce. *West India Fruit Co.*, 130 NLRB No. 46, 47 LRRM 1269 (1961); *Peninsular and Occidental SS. Co.*, 132 NLRB No. 1, 48 LRRM 1293 (July 10, 1961), and *Eastern Shipping Corp.*, 132 NLRB No. 72, 48 LRRM 1436 (August 10, 1961). The New York Court of Appeals therefore correctly applied *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236 (1959).

3. Review by this Court of the question at issue should be entertained, if at all, where the NLRB is a party to the proceedings. Such opportunity will undoubtedly arise after the United States Court of Appeals for the 5th Circuit decides *West India* (*supra*), now before it on the company's petition for review and the Board's cross petition for enforcement of its order.

4. Since there has been no exhaustion of the administrative processes of the NLRB, which is presently considering the dispute between the parties, there is no warrant for judicial intervention at this time. *Myers* v. *Bethlehem Shipbuilding Corporation*, 303 U. S. 41 (1938).

Statement of the Case.

The Parties.

Petitioner (plaintiff below) Incres Steamship Company, Ltd. (hereinafter called "Incres") operates two luxury ocean liners in the cruise trade between New York City and Caribbean and South American ports. Although nominally incorporated in Liberia, Incres manages its cruise business

in New York in its own name and jointly with a controlled New York corporation—Incres Lines Agency, Inc. (hereinafter called "Incres Agency") (R. 11, 397-8, 409).

Respondent (defendant below) International Maritime Workers Union (hereinafter called "IMWU") is an American labor union formed to organize merchant seamen employed aboard "runaway" or "flag-of-convenience" ships, i.e., foreign-flag vessels owned by absentee interests unconnected with the flag nation (R. 285, 290-1, 295-7, 397-8, 409-10; Defs. Ex. E—Preamble, Article II).

Defendant Shannon J. Wall is the Executive Director of IMWU (R. 284). The other defendants have not been served and do not appear.

Pleadings.

Complaint.

The complaint alleges that Incres' principal office is in Monrovia, Liberia (R. 28); and its two vessels, SS. *Nassau* and M/S. *Victoria*, are manned by Italian seamen belonging to an Italian labor union which has "approved" the employment contract (R. 12).[1]

The complaint further alleges that on May 13, 1960, IMWU began to picket the vessel with signs demanding recognition (R. 13). Crew members stopped working "some in the hope of higher wages . . . others in fear of reprisal," and longshoremen stopped loading (R. 13).

By way of legal conclusion, IMWU's actions are claimed to be unlawful because, *inter alia*, the union:

> (a) Seeks to compel recognition although it "does not lawfully represent a majority of the crew," and Incres is the "innocent victim of a jurisdictional dispute between rival unions" (R. 14-15).

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[1] The record discloses that Incres seamen are not members of an Italian labor union (243).

(b) Cannot be certified as bargaining agent "by either the National Labor Relations Board or the New York State Labor Relations Board" because neither state nor federal labor relations statutes "apply to foreign ships with foreign crews in any way" (R. 15-16).

(c) Is interfering with the "internal management and relations of a foreign vessel" (R. 15).

Amended Answer.

The amended answer denies material allegations of the complaint, although it admits that IMWU picketed and a majority of the crew members voluntarily struck (R. 42-3).

The first affirmative defense alleges that the National Labor Relations Board has exclusive jurisdiction of the subject of the action.[2]

Petitioner's Operations.

Incorporated and registered under the laws of Liberia and having a nominal office in London, England, petitioner's vessels have never touched the shores of either country (R. 105, 119). Both vessels, except for an annual voyage to Genoa, are regularly engaged in the passenger cruise trade between New York and various Caribbean and South American ports (Par. 5 of complaint, R. 11, 119). All such voyages originate and terminate in New York (R. 194-5, 233); each vessel completing approximately thirty such voyages in a cruise season (R. 119). Realistically, the vessels are floating hotels for American vacationists from the New York area and are regularly engaged in American commerce.

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[2] For the purpose of this petition the remaining four affirmative defenses are not material to the issue before this Court.

Petitioner's business is conducted as a single integrated operation with its namesake and *alter ego*, Incres Agency, a New York corporation which it controls (R. 398, 409).

Both companies use a common letterhead under the heading "Incres Line" (R. 364, 367, 1099). Vincenzo Berlingeri, Incres' President and member of its Board of Directors (R. 114), resides in New York (R. 113) and maintains his office at 39 Broadway, from which he transacts petitioner's business (R. 105-6). He is also an officer and director of Incres Agency (R. 114).

From their common offices at 39 Broadway, Berlingeri and employees of Incres or Incres Agency handle or oversee the vital matters of passenger bookings (R. 106), provisioning (R. 106, 109, 326), arrangements for arrivals and departures, inspections, fueling, advertising, repairs, cargo and other husbandry details (R. 106, 107, 109-112, 251, 255).

Labor relations matters are similarly dealt with from 39 Broadway, including discipline, personal problems of crew members and such items as requests for promotions (R. 106, 119-20, 248-9).

The management and control of its operations from New York are only one aspect of Incres' significant American contacts. Another is its financing. The trial disclosed that a fleet mortgage for $4,000,000 covering the *Nassau* and *Victoria* is held by the Bank of America (R. 101). The mortgage confirms the intimacy of the relationship between Incres and Incres Agency. Among other things, the Agency undertakes to act as guarantor for repayment of principal and interest; the signature page indicates that the person who then executed the Loan and Credit Agreement as President of Incres Agency was one R. F. Barnett, the same person who executed the mortgage for Incres. A recorded amendment to the mortgage, dated

September 11, 1959, shows it to have been executed by Berlingeri, as Vice-President of Incres and President of Incres Agency. (Although not referred to in the record these documents are on file in the office of the Deputy Commissioner of Maritime Affairs of the Republic of Liberia for the Port of New York.)

Corporate semantics aside, the foregoing facts lead to the inescapable conclusion that Incres and its Agency, cemented together by interlocking officers and directors (R. 114) conduct a single integrated operation in which the activities of one are indistinguishable from the activities of the other.

IMWU Organizational and Picketing Activities.

IMWU began to organize the crews of the *Nassau* and *Victoria* in February 1960 (R. 299). Within two months its organizers succeeded in obtaining pledge cards from a majority of the crew members (R. 299-300). Thereafter, representatives of the Company and the Union entered upon discussions relating to the Union's demand for recognition and a collective bargaining agreement (R. 31-33, 302-4, 306).

When it became apparent that Incres would not voluntarily recognize IMWU, the Union picketed the *Nassau* on May 13, 1960, and the *Victoria* on May 15, 1960 (R. 33-34).

This action was instituted on May 16, 1960, when Incres obtained an *ex parte* temporary restraining order which enjoined the Union from picketing its vessels or urging or encouraging crew members not to work on the vessels (R. 8-9). On the same day IMWU filed unfair labor practice charges against Incres, which are still being processed by the National Labor Relations Board (R. 39-301).

Argument.

1.

On April 24, 1961, this Court denied certiorari in *Navios Corporation* v. *National Maritime Union*, 402 Pa. 325 (1960), 81 S. Ct. 1047. A subsequent petition for reargument was denied on May 29, 1961, 81 S. Ct. 1658.

Although differently phrased, the questions framed by petitioner in the instant case are substantially identical to those presented in *Navios*.

In *Navios* as here, petitioner bottomed its argument for the granting of certiorari upon the primary ground that the holding of the Pennsylvania Supreme Court was in irreconcilable conflict with *Benz* v. *Compania Naviera Hidalgo, S. A.*, 353 U. S. 138 (1957). We respectfully submit that *Benz* is clearly distinguishable. As every authority has recognized, the key to this Court's holding in that case was that the vessel was only "transiently" r "temporarily" in American commerce:

> "The only American connection was that the controversy erupted while the ship was transiently in a United States port and American labor unions participated in its picketing" (353 U. S. 138, 142).

In *Navios* the Pennsylvania Supreme Court quoted this language in italics (402 Pa. at p. 333).

In *Marine Cooks & Stewards* v. *Panama SS. Co.*, 362 U. S. 365, 369 (1960), this court underscored the same limitation of the *Benz* holding:

> "The question in the *Benz* case was whether the Labor Management Relations Act of 1947, 29 U. S. C. A. §141 et seq. governed the internal labor relations of a foreign ship and its foreign workers under

> contracts made abroad while that ship happened temporarily to be in American waters."

In *West India Fruit Co.*, 130 NLRB No. 46, 47 LRRM 1269 (1961), the NLRB stated that as it read *Benz*. this Court:

> "'. . . summarily dismissed commerce as a possible basis for jurisdiction because, as it emphasized, the ship was 'transiently' or 'temporarily' in American waters when the dispute arose."

Incres is cognizant of the critical significance in the *Benz* holding of the "transient" or "temporary" connection with American commerce. For this reason it is necessarily forced to take the position that its connection with American commerce is "temporary" and that the labor dispute involved here erupted while its vessels "were temporarily in United States ports" (Petition, p. 3).

If there ever was a steamship line with a "substantial continuing connection with American commerce" it is Incres. Elsewhere in its Petition (p. 4) this is candidly acknowledged. Incres' entire business is entirely in American commerce. Without its American patrons engaging for its cruises from New York, it would have no business. For Incres to claim that this connection is "temporary" and that the labor dispute in this case erupted while its vessels were transiently in an American port is simply an abuse of the concept of "temporary" or "transiently" as used in *Benz*. There is nothing happenstance about Incres' presence in the port of New York. The NLRB treated fully with *Benz* in *West India* (*supra*) and what it said in finding *Benz* inapplicable to the shipping operation involved there applies with equal force here, including the following:

> "In *Benz* to be sure, the Court was concerned with submitting a ship at each harbor to a new bargaining relationship if a mere 'temporary' contact with American waters were enough to support jurisdiction in labor matters. But where as here the vessel regularly and frequently sails from our harbors application of the Act would, if anything, tend to stabilize the bargaining relationship as it has in its other domestic applications" (47 LRRM at 1278).

On February 16, 1961 the Board, having asserted jurisdiction over foreign-flag shipping in *West India Fruit and SS Co., supra,* determined that the company had committed certain unfair labor practices and issued the usual order in the circumstances there obtaining.

Like the *Nassau* and *Victoria*, the ocean-going vessel in *West India* (the *Sea Level*), was of Liberian registry and was manned by alien seamen, none of whom was a United States resident. Also like the *Nassau* and *Victoria*, the *Sea Level* had never touched Liberian waters, although its crew signed Liberian articles and its officers were licensed by Liberia. Again, like the *Nassau* and *Victoria*, the *Sea Level*, "operated . . . as a common carrier in international and foreign commerce," made weekly trips between a port in the United States and a foreign country (i.e., Belle Chasse, Louisiana and Havana, Cuba).

West India is presently pending before the United States Court of Appeals for the 5th Circuit (No. 18929) on the company's petition for review and the Board's cross-petition for enforcement of its order. The sole issue before the Court is whether or not the Labor-Management Relations Act, as amended, is applicable to foreign flag vessels engaged in American commerce.

On July 10, 1961 the Board asserted jurisdiction over unfair labor practices committed on a foreign-flag vessel manned predominantly by non-resident aliens and beneficially owned by American interests. *Peninsular & Occidental Steamship Company, supra.* As petitioner notes this decision is also reviewable by the Federal Courts (p. 16 of petition).

In its most recent decision on the subject of foreign-flag vessels the Board directed an election for the unlicensed seamen employed aboard the SS. *Yarmouth,* a vessel owned by McCormick Shipping Corp., a Panamanian corporation. The *Yarmouth* flies the Panamanian flag and is operated primarily as a passenger cruise ship between Miami, Florida and Caribbean ports. Significantly, 95% of McCormick stock is held by persons who are neither citizens nor residents of the United States. The only material factual difference between Eastern and Incres is the location of the American port city where their respective cruises originate.

Since the General Counsel of the Board is presently considering the merits of the unfair labor practice charges filed by IMWU against Incres, it would appear on the authority of *Myers* v. *Bethlehem Shipbuilding Corporation* (*supra*) that the administrative processes of the Board must be fully exhausted before this Court intervenes.

Moreover, we respectfully submit that if this Court is inclined to review the question of NLRB jurisdiction over foreign-flag vessels it should do so when the Board appears as a party. As we have previously indicated *West India* is now pending before the United States Court of Appeals for the 5th Circuit.

Conclusion.

For the foregoing reasons we urge that the petition for a writ of certiorari be denied.

Respectfully submitted,

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